Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

NELSON O. ROBLES,

Petitioner,

v.

PRINCE GEORGE'S COUNTY, MARYLAND; JAMES ROZAR; ANTONIO DEBARROS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WERE THE RESPONDENT POLICE OFFICERS ENTITLED TO QUALIFIED IMMUNITY WHERE THEY ARRESTED THE PETITIONER ON A TRAFFIC WARRANT, AND SUBSEQUENTLY TIED HIM TO A POST AND ABANDONED HIM IN A SECLUDED AREA LATE AT NIGHT, WITHOUT ANY LEGITIMATE LAW ENFORCEMENT PURPOSE?

II. WHERE THE PETITIONER WAS TIED UP AND ABANDONED BY ARRESTING OFFICERS, WAS HE ENTITLED TO THE FOURTH AMENDMENT'S PROTECTIONS AGAINST UNREASONABLE SEIZURES, OR WAS HE A "PRE-TRIAL DETAINEE" SUBJECT ONLY TO THE PROTECTIONS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner is Nelson Robles, a citizen of El Salvador, and a legal resident alien of the United States. Mr. Robles was the plaintiff in the district court, and the appellant/cross appellee in the Court of Appeals for the Fourth Circuit. Petitioner has no corporate affiliations.

Respondents

Respondent Prince George's County is a public entity and a county of the State of Maryland. Respondents James Rozar and Antonio DeBarros are individuals employed as Prince George's County police officers at the time of the acts which were the subject of the complaint in this matter. Petitioners were defendants in the district court, and appellee's/cross appellants in the Court of Appeals for the Fourth Circuit.

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OPINIONS BELOW

The Court of Appeals for the Fourth Circuit issued an opinion denying a Petition for Rehearing and Rehearing *En Banc* (Luttig, J. dissenting) on October 29, 2002. That opinion is reported at 308 F3d. 437 (4th Cir. 2002), and is reproduced in appendix A.

The Court of Appeals for the Fourth Circuit issued its opinion on the merits on August 26, 2002. That opinion is reported at 302 F.3d 262 (4th Cir. 2002), and is reproduced in Appendix B.

The District Court for Maryland (Messitte, J.) issued an opinion granting the Motion for Summary Judgement on the record on October 25,. 1999. The transcript of the relevant portion of that proceeding is reproduced at appendix B. The District also issued a written order granting the motion for summary judgment on October 25, 2002. That order is reproduced at appendix C.

JURISDICTION

The Court of Appeals for the Fourth Circuit entered its judgement on August 26, 2002, and denied a timely filed petition for rehearing on October 29, 2002. The petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

Unreasonable searches and seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the United States Constitution

Sec. 1 [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

§ 1983. Civil action for deprivation of rights.

Every person who, under the color of any statute,

ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On August 17, 1996 at approximately 3:30 a.m., Prince George's County police officer Antonio DeBarros placed Nelson Robles under arrest on an outstanding traffic warrant. DeBarros was joined on the scene of the arrest by his shift commander, Lieutenant James Rozar. Mr. Robles was, by all accounts, cooperative and passive.

Rozar and DeBarros did not want the administrative burden of formally processing Robles on the warrant, which had been issued out of adjoining Montgomery County. They attempted to arrange for his informal transfer to a Montgomery County police officer at the county line. However, they were advised by a Montgomery County police supervisor that no officers from that jurisdiction were available to make such a transfer.

Upset by a perceived lack of cooperation by Montgomery County police, Rozar and DeBarros drove Robles to an abandoned parking lot on the Montgomery side of the county line. They located a dark and secluded area in

the rear of a shopping plaza, where they used plastic flexcuffs to secure Mr. Robles to a pole.

The officers prepared a note advising that Robles was the subject of warrants, and attempted to staple it to Robles' shirt. Unable to secure the note, they dropped it at Robles' feet along with his identification.

When Robles pleaded with the officers not to abandon him, they laughed. They told Robles that they were "not baby sitters." They invited him to "escape, if you can." They told Robles he was "not their problem anymore." Rozar and DeBarros then entered their police cruisers and drove away.

Lieutenant Rozar subsequently called the non-emergency number of the Montgomery County Police Department. Without identifying himself, Rozar told the dispatcher that there was "a dude tied up" at the shopping plaza.[1] Montgomery County police were dispatched to the scene.

Montgomery County police officers arrived an estimated 10-15 minutes later after Robles was initially flexcuffed to the post. The officers treated the area as a crime scene. They took photographs of Mr. Robles, and initiated an investigation into the incident.

The arriving officers were unable to free Mr. Robles from the post as they had nothing with which to cut the

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[1] DeBarros called his own dispatcher and falsely advised that Robles had been released.

flexcuffs. Robles remained flexcuffed to the post until a Montgomery County police supervisor arrived with a knife.[2]

Robles testified that he experienced extreme fright and humiliation on the night of the incident. This was corroborated by Montgomery County officers, who witnessed him crying, and heard him protest that he was a "human being." For several months following the incident, Robles suffered from feelings of depression, and experienced sleeplessness. This emotional suffering was corroborated by several witnesses.

Petitioner filed suit in the Circuit Court for Prince George's County, Maryland on October 26, 1998 alleging a violation of 42 U.S.C. §1983 and related state law claims. On January 6, 1999 the respondents removed the case to the United States District Court of Maryland.

The district court granted summary judgment on the basis of qualified immunity as to petitioner's federal claims. The court retained pendant jurisdiction on petitioner's state law claims. Petitioner recovered on those state law claims following a trial. The district court subsequently ordered a remittitur, and the petitioner opted for a new trial. Following a second trial, the petitioner again prevailed on his state law claims. He then filed a timely appeal to the United States Court of Appeals for the Fourth Circuit challenging, in part, the district court's decision to grant summary judgment on the federal claims.

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[2] Rozar anticipated this problem. In a recorded conversation with his dispatcher, Rozar joked about his plans to tie Mr. Robles to the post. He was amused by the prospect that the Montgomery County police would have difficulty freeing Mr. Robles from the flexcuffs.

The Court of Appeals affirmed the decision of the district court granting summary judgment on the basis of qualified immunity. Petitioner filed a timely motion for reconsideration of that decision. The Court of Appeals denied the motion for reconsideration, however, the Honorable J. Michael Luttig filed a lengthy dissent.

Jurisdiction in the district court was based on 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. §1343 (civil rights action). The district court had jurisdiction to hear petitioner's state law claims under 28 U.S.C. §1367(a) (pendant jurisdiction). Jurisdiction in the Court of Appeals was based upon 28 U.S.C. §1291.

REASONS FOR GRANTING THE PETITION

I. Were the Respondent Police Officers Entitled to Qualified Immunity Where They Arrested the Petitioner on a Traffic Warrant, and Subsequently Tied Him to a Post and Abandoned Him in a Secluded Area Late at Night Without Any Legitimate Law Enforcement Purpose?

In the lower court, the petitioner argued that the respondent police officers violated his Fourteenth Amendment rights to due process. Relying upon Bell v. Wolfish, 441 U.S. 520 (1979), the petitioner asserted that the officers' conduct served no legitimate law enforcement purpose and amounted to punishment. The petitioner further argued that the respondent officers were not entitled to qualified immunity because it would have been clear to a reasonable officer that his conduct under these circumstances violated the petitioners due process rights.

The Court of Appeals agreed that the conduct of the respondent police officers violated petitioner's constitutional rights. Relying upon Bell v. Wolfish, *supra.*, the court conceded that "[b]ecause the officer's actions were not related to any law enforcement purpose and Robles suffered more than a *de minimis* injury as a result of these actions, Robles' Fourteenth Amendment right to due process was violated." Robles v. Prince George's County, 302 F.2d 262, 270 (4th Cir. 2002). However, the court found that the officers were entitled to qualified immunity because the constitutional right violated was not clearly established. The court stated as follows:

> Although the officers' actions in this instance were foolish and unorthodox, it is also not clear that at the time they acted they should have reasonably known that their conduct violated Robles' constitutional rights.

Robles, 302 F.3d, at 271.

As explained below, the Fourth Circuit's opinion is clearly erroneous in light of the well established precedent of this Court. However, review by this Court is warranted not only because the Court of Appeals was incorrect. Review is necessary to avoid an erosion of the protection afforded by §1983 within the Fourth Circuit, as well as in other circuits. The Fourth Circuit's opinion adopts a startlingly broad view of qualified immunity which, if applied routinely, would extend the protections of that doctrine to any conduct which has not specifically been proscribed by case law. Under such an approach, the more outrageous the conduct of an official, the more likely that official will be entitled to immunity.

Judge Luttig expressed his grave concerns about the future application of the Fourth Circuit's published opinion in his dissent to the opinion denying the motion for reconsideration. Judge Luttig would have granted rehearing *en banc* not only to correct the decision of the court under the facts of this case, but to address "what are in fact the much larger implications of the panel's breathtaking expansion of the qualified immunity doctrine, and resulting constriction of 42 U.S. C. §1983..." Robles v. Prince George's County, 308 F.3d 437, 441 (4th Cir. 2002). Following a critical analysis of the Fourth Circuit's opinion in this case, Judge Luttig gave the following warning:

> Such a holding as that of the panel analytically completes the transformation of qualified immunity into absolute immunity and goes a long way toward the dissolution of §1983 itself.

Robles, 308 F.2d, at 445.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court held that government officials performing a discretionary function enjoy immunity in civil actions, insofar as their conduct does not violate clearly established law of which a reasonable person would have known. Harlow, *supra.*, at 818. The Court has developed a two step process for determining whether an official is entitled to qualified immunity. The Court has stated as follows:

> A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was

> clearly established at the time of the alleged violation."

Wilson v. Layne, 526 U.S. 603, 609 (1999), *citing*, Conn v. Gabbert, 526 U.S. 286 (1999).

A right is clearly established where "a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). However, [t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law, the unlawfulness must be apparent." Anderson, *supra.*, at 640, *citing*, Mitchell v. Forsyth, 472 U.S. 511, 535, n. 12 (1985) and Malley v. Briggs, 475 U.S. 335, 344-345 (1986).

In the case at bar, the Fourth Circuit based its decision on the "clearly established" element of the qualified immunity analysis. The court ruled that the holding in Bell, *supra.*, did not clearly establish that the conduct of the respondent officers violated Mr. Robles' rights to due process. Robles, 302 F.3d., at 270. The court emphasized the fact that Robles failed to cite a case in which conduct similar to that of theRespondent officers had been ruled unconstitutional.[3]

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[3] Actually, the petitioner did cite a number of cases which involved specific examples of due process rights violations in the context of pretrial detainees. Petitioner cited Putnam v. Gerloff, 639 F.2d 415 (8th Cir. 1981) (due process violation where detainees were handcuffed together and left in a sitting position in a cell for 12 hours without the use of restroom); Wilkins v. May, 872 F.2d 190, 195 (7th Cir. 1989) (plaintiff stated a claim under the Due Process Clause where he complained that detective held a gun to his head during interrogation); Fisher v. Washington Metropolitan

Robles, 302 F.3d, at 271. The Court of Appeals stated as follows:

> Robles contends that his rights under the Due Process Clause were clearly established by Bell. He asserts that a "reasonably well trained officer in the position of the defendants would have known that it was unconstitutional to subject an individual to conditions amounting to punishment." However, as the district court recognized, a greater degree of specificity is required to overcome a defense of qualified immunity. Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d. 523 (1987).

Robles, 302 F.3d., at 270.

Transit Authority, 690 F.2d 1133, 1142 (4th Cir.1982) (pretrial detainee has a due process right to be free from "involuntary exposure in a state of nakedness to members of the opposite sex unless that exposure was reasonably necessary in maintaining her otherwise legal detention"); Jefferson v. Ysleta Independent School District, 817 F.2d 303 (5th Cir., 1987) (where teacher tied student to chair for an entire school day with no justification, court found a violation of the due process clause for which the teacher was not entitled to qualified immunity). The Court of Appeals distinguished these cases as involving "instances where detainees were subject to physical abuse or prolonged and inhumane conditions of detention." Robles, 302 F.2d, at 271. In so distinguishing the cases, the Court of Appeals seems to have missed the point. Those cases were examples of instances where individuals were subjected to arbitrary government treatment which amounted to punishment. The cases serve as notice that such arbitrary conduct is unconstitutional. The relative level of punishment imposed by the arbitrary conduct is irrelevant.

The Fourth Circuit misconstrued this Court's ruling in Creighton v. Anderson, and failed to properly apply the standards for determining whether a right is clearly established, which were outlined in United States v. Lanier, 520 U.S. 259, 271 (1997); Wilson v. Layne, *supra.*; Saucier v. Katz, 533 U.S. 194 (2001); and, most recently in Hope v. Pelzer, 122 S.Ct. 2509 (2002). In fact, by holding that petitioner's due process rights were not clearly established, the Court of Appeals made the an error similar to that which was made by the Sixth Circuit in Lanier, and the Eleventh Circuit in Hope.

The proper inquiry for determining if a right is clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, *supra.*, at 202. This does not mean that the precise conduct engaged in by the official must have been ruled unlawful in the past. There need only be authority which provides "fair warning" that the officials conduct violated constitutional rights. Hope, *supra.*, at 2516. General constitutional principles outlined by this Court may provide such warning. Lanier, *supra.*, at 271; Hope, *supra.*, at 2516.

In Lanier, a state judge was convicted under 18 U.S.C. §242 for committing sexual assaults under color of law in violation of the Due Process Clause. The Sixth Circuit set aside those convictions for lack of notice that the commission of a sexual assault would violate due process. In so holding, the Sixth Circuit held that the constitutional right at issue had not been previously identified in a case with "fundamentally similar" facts. Lanier, *supra.*, at 261.

This Court held that the "fundamentally similar" standard was more strict than the Constitution required.

Lanier, *supra.*, at 261. The Court stated that the "specificity envisioned by the Court of Appeals" was not necessary to give "fair warning" that the conduct of the defendant was unconstitutional. Lanier, *supra.*, at 268. The Court found that general statements of the law could provide sufficient notice. The Court stated as follows:

> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.

Lanier, *supra.*, at 271.

In Hope, the Eleventh Circuit also applied an incorrect standard in determining whether a right was clearly established. In that case, the Court of Appeals found that officers who had handcuffed prisoners to a hitching post as a punitive sanction were entitled to qualified immunity from liability under the Eighth Amendment because such conduct had not been held unconstitutional by earlier cases with "materially similar" facts. Hope, *supra.*, at 2512. This Court reversed, stating as follows:

> In assessing whether the Eighth Amendment violation here [was clearly established] the Court of Appeals required that the facts of previous cases be "materially similar to Hope's situation." This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases.

Hope, *supra.*, at 2515 (citation omitted). Relying upon Lanier, the Court held that no similar prior case was necessary to demonstrate that the right at issue was clearly established. The Court stated as follows:

> Our opinion in Lanier thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in Lanier, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to Lanier, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Hope, *supra.*, at 2516. This Court held that Hope's jailors had adequate notice that their treatment of Hope violated his constitutional rights against cruel and punishment. In so holding, the Court stated that the most general constitutional principles would have provided fair warning. The Court stated that "[a]rguably, the violation was so obvious that our own Eighth Amendment cases gave the respondents fair warning that their conduct violated the constitution." Hope, *supra.*, at 2516.

In the case at bar, the Fourth Circuit did not require that the petitioner cite a "fundamentally" or "materially"

similar case in order to demonstrate that his rights to due process were clearly established. However, the court's approach was just as narrow as that of the courts of appeal in Lanier and Hope because it required a specific case where general constitutional principles should have sufficed. Although the court feigned adherence to the principles established by this Court, it dismissed the clearly established law of Bell as being overly general, and required a the petitioner to cite a more specific case. This approach is tantamount to requiring a previous ruling that the specific conduct respondent officers was unconstitutional.

In fact, the Fourth Circuit's application of the qualified immunity doctrine in the case at bar was much more insidious than in those in Lanier and Hope because the court ostensibly applied the proper standards. The court recognized that "notice does not require that the 'very action in question has to be unlawful..'" Robles, 302 F.3d, at 270. However, the Fourth Circuit proceeded to require just that, by refusing to apply the general constitutional principles of Bell which applied to the officer's conduct with obvious clarity.

Judge Luttig recognized that the general rule of Bell supplied sufficient notice that the conduct of the respondent police officers violated Robles' due process rights. Judge Luttig stated as follows in his dissent:

> [I]t has now been almost a quarter century since the Supreme Court held in Bell v. Wolfish, that the official treatment of pre-trial detainees that causes greater than *de minimis* injury and has *no* legitimate governmental purpose whatsoever amounts to unconstitutional punishment. And in the

> intervening years, the Court has been unwavering to this principle.

Robles, 308 F.3d 442 (citations omitted). Judge Luttig would correctly have found it unnecessary for the petitioner to cite a factually similar case in order to show that the respondent officers violated his clearly established rights. Judge Luttig stated as follows:

> It should be apparent that I do not believe that a decided case is necessary in order for officers to be on fair notice that conduct like that by the officers here is violative of the Constitution...But if decided authority is required, the panel would have found that authority extant, in the form of the Supreme Court's decision in Bell v. Wolfish, had it simply proceeded to inquire, as it originally said that it must, whether a pretrial detainee's right not to be injured by officials acting as did these officers was clearly established at the time of the incident. Faced foursquare with Bell v. Wolfish, the panel's answer on the immunity question assuredly would have been different.

Robles, 308 F.3d 446. Finally, Judge Luttig recognized that the effect of the Court's opinion was to require that the specific conduct of an official must previously be ruled unconstitutional in order to avoid the application of the qualified immunity doctrine. He stated as follows:

> Contrary to the panel's characterization of the appellant's claim, *see*, Robles, 302 F.3d at 270 – a characterization that enabled easy rejection

> – appellant did not assert merely the violation of his right as a detainee not to be punished. Rather, he asserted the considerably more specifically defined right, per Bell v. Wolfish, not to be seriously injured as the result of official conduct that serves no legitimate purpose. The difference between the specificity of this right, and that to "due process of law" which was held by the Court in Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 30304, 97 L.Ed.2d 523 to be insufficiently specific to provide officials with adequate notice, could hardly be any greater. And the contours of this right are more than sufficiently apparent to place officers on notice *at least* that the conduct engaged in by these defendants violated the Constitution. **To hold otherwise, as the panel did, *see*, Robles, 302 F.3d at 270, *is*, as appellant maintains in his petition for rehearing *en banc*, tantamount to holding that "the very action in question [must] previously [have] been held unlawful, Wilson v. Layne, 526 U.S. at 615, 119 S.Ct. 1692 – the panel's disclaimer that it did not so hold notwithstanding.**

Robles, 308 F.3d. at 446 (**emphasis added**).

As Judge Luttig recognized, the Fourth Circuit's holding in this case sets a precedent wherein it will be incumbent upon §1983 plaintiff's to demonstrate factually similar precedent in order to establish that their rights were clearly established. This is contrary to this Court's opinions, which contemplate that Supreme Court precedent which establishes general constitutional principals may serve as

sufficient notice to officials, where it applies with obvious clarity. Under the Fourth Circuit's application of the qualified immunity doctrine, the most outrageous conduct of government officials will be protected simply because there is no precedent forbidding such conduct. Such an expansive view of qualified immunity would prevent the vindication of constitutional rights in the most egregious of cases.

II. Where the Petitioner Was Tied Up and Abandoned by Arresting Officers, Was He Entitled to the Fourth Amendment's Protections Against Unreasonable Seizures, or Was He a "Pre-Trial Detainee" Subject Only to the Protections of the Due Process Clause of the Fourteenth Amendment?

In addition to a violation of his rights under the Due Process Clause, the petitioner argued below that the conduct of the respondent police officers violated his rights under the Fourth Amendment. Analysis of qualified immunity under the Fourth Amendment would have availed the petitioner of an additional body of case law demonstrating that the right at issue was clearly established.[4] However, the Fourth Circuit

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[4] The contours of the Fourth Amendment have been examined extensively by the Courts in the context of arrests and detentions. There are a plethora of opinions which are analogous to the case at bar. These opinions would have put a reasonably well trained officer in the position of the defendants on notice that it was unconstitutional to exceed the lawful scope of a seizure by causing fear, humiliation or discomfort. *See, e.g.*, DeGraff v. District of Columbia, 120 F.3d 298 (D.C. Cir. 1997) (female driver lawfully arrested for driving while intoxicated was carried, placed on the ground, and handcuffed to a mailbox); United States v. Langer, 958 F.2d 522 (2nd Cir. 1992) (over the course of one year, a police officer stopped several female drivers on a deserted stretch of

rejected the petitioner's Fourth Amendment claim, holding that "Robles' status at the time of this incident was that of a pretrial detainee, and the Fourth Amendment does not extend to such situations." Robles 302 F.2d at 269.

This Court has held that 42 U.S.C. §1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Albright v. Oliver, 510 U.S. 266, 271 (1994) (*citations omitted*). Analysis of a claim under §1983 begins with identification of the specific right allegedly infringed. Albright, *supra.*, at 271, *citing* Graham v. Connor, 490 U.S. 386, 394 (1989). In the case at bar, identification of the constitutional right infringed ultimately turned on a determination of whether Mr.

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highway for driving while intoxicated and detained them from 10 minutes to 1 hour, causing them fear and anxiety); Amaechi v. West, 237 F3d. 356 (4th Cir. 2001), (female arrested for a misdemeanor was searched while in a semi-nude condition in front of husband, neighbors and children); Heitschmidt v. City of Houston, 161 F.3d 834 (5th Cir. 1998) (individual handcuffed and denied use of restroom for 4 hours during the execution of a search warrant); Baker v. Monroe Township, 50 F.3d 1186 (3rd Cir. 1995) (individuals who were visiting residence during execution of search warrant were held at gunpoint, handcuffed and detained for 25 minutes); Franklin v. Foxworth, 31 F.3d 873, 876-877 (9th Cir. 1994) (law enforcement officers behaved unreasonably in removing a gravely ill and semi-naked man from his sickbed without providing any clothing or covering, and then by forcing him to remain sitting handcuffed in his living room for two hours rather than returning him to his bed within a reasonable time after the search of his room."); Posr v. Doherty, 944 F.2d 91 (2nd Cir. 1991)(arrest must be supported by probable cause; detention must be supported by reasonable suspicion; and, both must be reasonable).

Robles was an "arrestee" or "pre-trial detainee" at the time of his arrest.

In Graham v. Connor, 490 U.S. 386, 394 (1989), this Court held that the Fourth Amendment applies to claims arising from "an arrest, investigatory stop, or other seizure of a free citizen." Graham, at 395. The Court also recognized that the Due Process Clause protects a pre-trial detainee from conduct which amounts to punishment. Graham, at 395 n. 10. But this Court expressly left unanswered the question whether seized individuals are protected by the Fourth Amendmen even after the arrest ends and pre-trial detention begins.[5] *Id.* Moreover, assuming the Fourth Amendment does not apply to pre-trial detentions, this Court gave no guidance as to when an arrest ends, and a pre-trial detention begins.

The Fourth Circuit's approach to these unanswered questions is embodied in its opinion in the case at bar. In rejecting the petitioner's claim under the Fourth Amendment, the Court of Appeals stated as follows:

> The Fourth Amendment "governs claims of excessive force during the course of an arrest, investigatory stop or other 'seizure' of a person. Riley v. Dorton, 115 F.3d 1159, 1161 (4th Cir. 1977) (en banc). However, this Court has rejected any concept of a continuing

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[5] This Court defined "seizure" for Fourth Amendment purposes as the use of "physical force or show of authority" that "in some way restrain[s] the liberty of the citizen." Graham, at 395 n. 10. This definition is, of course, broad enough to encompass pre-trial detentions.

> seizure rule, noting that "the Fourth Amendment...applies to the initial decision to detain an accused, not to the conditions of confinement after that decision has been made." *Id.* at 1163 (internal citations and punctuation omitted). Once the single act of detaining an individual has been accomplished, the Amendment ceases to apply.

Robles, 302 F.2d at 268.

As is demonstrated by the foregoing, the Fourth Circuit refuses to extend Fourth Amendment protections to persons in pre-trial detention. In addition, the Fourth Circuit has narrowed the application of the Fourth Amendment by rejecting the concept of a "continuing seizure."[6] Under Fourth Circuit law, the only conduct which is actionable under the Fourth Amendment occurs in the first moments of the arrest.

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[6] Although the Fourth Circuit has rejected a "continuing seizure" rule, it has also failed to give any guidance as to when an arrest ends and a pre-trial begins. *See*, Bartram v. Wolfe, 152 F.Supp.2d. 898, 910 (Dist.Ct.Md. 2001) ("Riley did not, however, establish a simple rule to determine when Fourth Amendment protection ends"). Moreover, the Fourth Circuit itself has performed a Fourth Amendment analysis under circumstances where the initial arrest had been completed. *See*, Elliott v. Leavitt, 105 F.3d 174 (4th Cir. 1997) (Fourth Amendment applied where injury occurred when plaintiff was handcuffed and sitting in police cruiser); McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994) (Fourth Amendment applied where arrestee was handcuffed and waiting for presentation to Magistrate in police station).

Although this Court has not answered directly the questions posed by Graham, it has given some indication that Fourth Amendment protections extend beyond the intial seizure. In Albright v. Oliver, 510 U.S. 266 (1994), the petitioner was prosecuted in the absence of probable cause. Although, he asserted claims under substantive due process, the Court held that his claims should properly have been brought under the Fourth Amendment. The Court stated as follows:

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims." We think the principle is likewise applicable here. The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.

Albright, *supra.*, at 273-274, *citing*, Graham, at 395.

Despite the holding in Albright that the Fourth Amendment applies to "pretrial deprivations of liberty," several courts of appeal have followed the Fourth Circuit in declining to extend the Fourth Amendment beyond the initial arrest or seizure. However, even those Courts disagree as to when the initial arrest or seizure ends, and the pre-trial detention begins.

The Fifth Circuit has held that the Fourth Amendment does not apply to a post-arrest encounter. Brothers v. Klevenhagen, 28 F.3d 452, 456 (5th Cir. 1994). But, unlike

the Fourth Circuit, that court does not apply a rigid view of what constitutes an arrest. Rather, the Fifth Circuit considers a number of factors in determining whether an arrest has evolved into a pre-trial detention.[7] Those factors include (1) whether the incident of arrest is complete; (2) whether the arrestee is released from arresting officer's custody, and (3) whether the arrestee is in detention awaiting trial for a significant period of time. Brothers, *supra.*, citing Valencia v. Wiggins, 981 F.2d. 1440, 1443-1444 (5th Cir. 1993).

The Seventh Circuit has also held that the Fourth Amendment does not apply to a post arrest encounter. Reed v. City of Chicago, 77 F.3d 1049, 1052, *citing*, Wilkins v. May, 872 F.2d 190, 193 (7th Cir. 1989).[8] However, that Court provides liberal Fourth Amendment protection to arrestees by defining an arrest as that period of time between the initial seizure and presentation to a magistrate for a determination of probable cause. Reed, *supra.*, at 1052. ("[S]eizure of arrestee ends after the Gerstein hearing."). The Tenth Circuit has defined arrest in the same manner. Barrie v. Grand County, 119 F.3d 862, 866 (10th Cir. 1997) (Fourth Amendment applies to "a period of detention immediately following arrest and before the person is taken before a

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[7] Although the Fifth Circuit has developed its own approach to the question of when an arrest ends, it has noted a lack of guidance on this issue. Valencia v. Wiggins, 981 F.2d. 1440, 1449, n. 4 (5th Cir. 1993) ("Precisely when the arrest mode ceases and the detainment mode begins remains an unanswered question.").

[8] The Seventh Circuit has expressed some doubt about its position in light of Albright. Garcia v. City of Chicago, 24 F.3d 966, 970, n.6 (7th Cir. 1994) (Albright "cast considerable doubt on the applicability of substantive due process" to pre-trial detentions.)

magistrate official, to determine whether the arrest and detention are based on problable cause").

At the other end of the spectrum, the Second Circuit has extended Fourth Amendment protections beyond the initial arrest, and into the period of pretrial detention. Lauro v. Charles, 219 F.3d 202 (2nd Cir. 2000) (Fourth Amendment violation where plaintiff was arrested, processed and subsequently taken from the police station and displayed to the press in a staged "perp walk."); Murphy v. Lynn, 118 F.3d 938 (2nd Cir. 1997) (post arraignment order that arrestee not leave the State was seizure under the Fourth Amendment).

The Third Circuit has taken a moderate view of whether the Fourth Amendment might apply to a post arrest encounter. Although the Third Circuirt has concluded that "the limits of Fourth Amendment protection relate to the boundary between arrest and pre-trial detention," the Court has acknowledged that "there may be some circumstances during pre-trial detention that implicate Fourth Amendment rights." Torres v. McLaughlin, 163 F.3d 169, 174 (3rd Cir. 1998) As to the question of when an arrest ends and a pre-trial detention begins, the Third Circuit has noted a lack of guidance on this issue, stating as follows:

> Although the Supreme Court has repeatedly defined when a Fourth Amendment seizure occurs or begins, it has not determined when that seizure ends and the Fourth Amendment protections no longer apply.

McLaughlin, *supra.*, at 174, *citing*, United States v. Johnstone, 107 F.3d 200, 206-207 (3rd Cir. 1997) (commenting "[w]here the seizure ends and pre-trial detention begins is a difficult question."). However, it is clear that the

Third Circuit does not take as narrow a view as the Fourth Circuit in determining when a seizure ends. *See,* Johnstone, *supra.*, at 205-206 (court found that Fourth Amendment was properly applied where arrestee was beaten in the garage of police station).

The Sixth Circuit has not decided whether Fourth Amendment protections might extend into a pre-trial detention. Johnson v. Cincinnati, 310 F.3d 484 (6th Cir 2002). However, that court has defined Fourth Amendment seizures broadly, holding that a seizure "continues throughout the time the person remains in the custody of arresting officers." McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988). This rule has also been adopted by the Ninth Circuit. Fontana v. Haskin, 262 F.3d 871, 879 (9th Cir. 2001) ("once seizure occurs it continues througout the time the arrestee is in the custody of the arresting officers...").[9]

The Eighth Circuit has also not addressed whether the Fourth Amendment applies to pre-trial detentions. However, that court has extended Fourth Amendment protection to situations in which the intitial seizure had long passed. *See,* Wilson v. Spain, 209 F.3d 713 (8th Cir. 2000) (Fourth Amendment applied where suspect was injured after having been booked and placed in a cell); Moore v. Novak, 146 F.3d. 531 (8th Cir. 1988) (Fourth Amendment applied where force used against jail detainee during booking process); Maynard v. Hopwood, 105 F.3d. 1226 (8th Cir. 1997) (Fourth

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[9] Pre-Albright decisions of the Second Circuit adopted the same rule. Powell v. Gardner, 891 F.2d 1039, 1044 (2nd Cir. 1989). However, the Second Circuit's application of the Fourth Amendment to pre-trial detentions appears now to be more expansive. *See,* Lauro and Murphy, *supra.*

Amendment applied where force used against arrestee who was restrained in the back of police car).

This split of authority leads to incongruous results for those seeking to vindicate their Fourth Amendment rights in the various circuits. The circumstances in the case at bar serve as an example of the potential inequities. In the Fourth Circuit, Mr. Robles was deemed to be protected only by the Due Process Clause by virtue of the fact that his "initial seizure had ended." Although he remained with the arresting officers, and was never taken to a police station, their physical abuse of him did not violate the Fourth Amendment. In some circuits, Mr. Robles would have been deemed to be an "arrestee" based upon the factual circumstances of his seizure, and therefore subject to the "reasonableness" strictures of the Fourth Amendment. In still other circuits, he would have been determined to be a pre-trial detainee, but nevertheless entitled to the protection of the Fourth Amendment by virtue of the fact that he was seized.

CONCLUSION

The petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and reverse the decision of that court.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1662, No. 01-1728

[Filed October 29, 2002]

NELSON O. ROBLES,
Plaintiff-Appellant,

v.

PRINCE GEORGE'S COUNTY, MARYLAND; JAMES ROZAR; ANTONIO DEBARROS,
Defendants-Appellees.

NELSON O. ROBLES,
Plaintiff-Appellee,

v.

PRINCE GEORGE'S COUNTY, MARYLAND; JAMES ROZAR; ANTONIO DEBARROS,
Defendants-Appellants.

On Petition for Rehearing and Rehearing En Banc
(CA-99-31-PJM).

JUDGES

WILKINSON, Chief Judge, concurring in the denial of rehearing en banc. LUTTIG, Circuit Judge, dissenting from denial of rehearing en banc.

On Petition for Rehearing and Rehearing En Banc

Appellant/Cross-Appellee filed a petition for rehearing with petition for rehearing en banc.

The panel voted to deny rehearing.

A member of the Court requested a poll on the suggestion for rehearing en banc, and a majority of the judges voted to deny rehear ing en banc. Judge Luttig voted to grant rehearing en banc. Chief Judge Wilkinson, and Judges Widener, Wilkins, Niemeyer, Williams, Michael, Motz, Traxler, King, and Gregory voted to deny rehearing en banc.

Chief Judge Wilkinson filed an opinion concurring in the denial of rehearing en banc. Judge Luttig filed an opinion dissenting from the denial of rehearing en banc.

The Court denies the petition for rehearing and petition for rehearing en banc.

Entered at the direction of Chief Judge Wilkinson for the Court.

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For the Court

CONCUR

WILKINSON, Chief Judge, concurring in the denial of rehearing en banc:

The panel opinion sets forth the basis for its decision, and I see no need to repeat that earlier discussion. *See Robles v. Prince George's County*, 302 F.3d 262 (4th Cir. 2002). Inasmuch as my good colleague has written in dissent, however, I offer these brief thoughts in response.

To read the dissent, one would think that the panel's decision had in some way been approving of the officers' behavior in this case. Far from it. The opinion disapproves what happened here in no uncertain terms. It condemns the conduct as "Keystone Kop activity" that was "foolish and unorthodox." *Id.* at 271. It recognizes that the officers' actions were "immature" and "adolescent." *Id.* at 270, 273. The decision leaves no doubt this type of conduct is unacceptable.

The panel also rejected the government's purported justification for the incident. According to Prince George's County, Montgomery County had been reluctant to accept any custody transfers of detainees who belonged to Montgomery. Prince George's contended that the so called prank here was merely a misguided attempt to convince neighboring Montgomery County to be more receptive to transfers of custody when the detainee was subject to outstanding warrants in Montgomery. *Id.* at 269. The panel rejected that assertion, finding that "it was hardly necessary to tie someone to a metal pole in a deserted parking lot, for however brief a time, in order to effect a transfer of custody." *Id.*

The panel also concluded that Robles had offered sufficient evidence that he suffered more than *de minimus* injury, but that issue was close. *See Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979); *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (en banc). After all, Robles was left alone for only 10 minutes, during which time no one bothered him. He concedes that he suffered no physical injury and that the officers told him that someone would pick him up there later. He offered no objective evidence (e.g. lost wages or medical expert testimony) to support his claim of psychological injury. In concluding that Robles had presented a triable issue of more than *de minimus* injury, the panel again gave Robles, not the officers, the benefit of the doubt.

Finally, the panel found a constitutional violation which allowed the plaintiff to proceed before a jury on his due process claim. It recognized that even if the officers were merely acting immaturely, and even if the panel accepted their assertion that they acted without specific intent to punish, due process guarantees were still implicated. The panel clearly acknowledged that even so-called police pranks of short duration and without any evidence of physical abuse can rise to the level of a constitutional violation. 302 F.3d at 269-70.

What the panel was unwilling to do was to take this holding of first impression and strip the qualified immunity defense of any notice component whatsoever. While stupid or inappropriate behavior on the part of the police can rise to the level of a federal constitutional violation, not every violation of state law does so. The Constitution is not a "font of tort law" to be "superimposed upon whatever systems may already be administered by the States." 302 F.3d at 271

(quoting *Paul v. Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)). Thus, the fact that the officers "clearly appreciated the wrongfulness of their actions" does not mean that they understood their actions to be a violation of the federal Constitution. 302 F.3d at 273. The Supreme Court has made clear that the very vagaries of the Due Process Clause mean that a specific enunciation of the principles of constitutional liability is required. *Anderson v. Creighton,* 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). Under *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), conduct must violate clearly established *constitutional* rights. *Id.* at 817-18. And under *Anderson* the contours of those rights must be clear. 483 U.S. at 640. To equate knowledge of wrongfulness in a generic sense with knowledge of unconstitutionality in a specific sense is not consistent with the rule of law. The latter requires notice, something to which even the worst criminal wrongdoer is entitled.

In reasoning as it did, the panel followed the two-step analysis in *Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991), and *Wilson v. Layne*, 526 U.S. 603, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). Under step one of that analysis, if a constitutional violation is found then it will nearly always be a "bad act." In fact the constitutional violation in *Wilson* could be argued to be a far more invasive act than the incident the panel confronted here. If every bad act under step one of the *Wilson* analysis sufficed by itself to answer the step two qualified immunity inquiry, there would simply be no qualified immunity defense. The district court felt strongly that the officers had not been placed on notice that their behavior, however dumb, violated a clearly established constitutional right.

My dissenting brother quotes at length from the majority's analysis under the first step of *Wilson*. The panel naturally relied on general language in *Bell v. Wolfish* to find a constitutional violation on these specific facts. The dissent indicates that the language of the step one analysis detailing the unconstitutionality of the officers' actions also suffices to satisfy the second prong of *Wilson*. However, the pitfalls of this approach should be apparent. If a court's general explanation of why an act is unconstitutional also suffices to supplant the need for specific notice, then there will be no independent force to the qualified immunity inquiry at all. The two steps of an analysis which the Supreme Court clearly intended to be sequential and distinct will simply collapse.

The concept of notice is rooted in case law. The panel emphatically did not require the plaintiff to come forward with a case on all fours with the present one in order to abrogate the qualified immunity defense. *See Anderson*, 483 U.S. at 640. It pressed for even one case that would put the officers on fair notice of a constitutional infraction, but all the cases plaintiff advanced involved much more egregious or far different circumstances than those present here. The plaintiff was unable to provide a single decision to illustrate even the general point that a fleeting or misguided prank rose to the level of a constitutional violation. Wilson requires that a plaintiff point to at least some pertinent authority. *526 U.S. at 617.* Plaintiff provided none at all.

Indeed plaintiff's major case, *Hope v. Pelzer*, 153 L. Ed. 2d 666, 122 S. Ct. 2508 (2002), not only came down six years after the incident in question here, but was also so factually far afield as not to serve notice of any sort. And even under the far more egregious circumstances in *Hope*, the

Court still divided sharply over the viability of the qualified immunity defense. It is impossible to compare a 10-minute incident with no physical abuse whatsoever to what the Supreme Court described in *Hope* as the "restricted position of confinement for a 7-hour period," which involved "exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." 122 S. Ct. at 2514. The Court in *Hope* went out of its way to stress the extended time period and the gratuitous infliction of pain, none of which, for all the stupidity of this behavior, came close to happening here.

The dissent fares no better than the plaintiff in citing even one case that is even factually in the neighborhood with this one. It simply contents itself with repeating the indisputable proposition that the behavior here was bad. But the Supreme Court requires that the availability of qualified immunity be determined through an examination of the case law, lest judging take leave of the touchstone of unlawfulness and become little more than a visceral exercise. "I know it when I see it" is not a substitute for qualified immunity analysis. In *Wilson*, the Court noted pointedly that "petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which they seek to rely." 526 U.S. at 616. Further, the plaintiffs failed even to identify "a consensus of cases of persuasive authority such that a reasonable officer" would have notice as to the unconstitutionality of his actions. *Id.* Likewise, in *Hope* the Court recognized the relevance of pertinent case law, holding that earlier circuit case law had put the defendants squarely on notice that they were violating the plaintiff's constitutional

rights. 122 S. Ct. at 2516 (referencing *Gates v. Collier*, 501 F.2d 1291, 1306 (Former 5th Cir. 1974)). While *Hope* certainly did not require prior cases to have fundamentally similar facts, neither did it take leave of the need to inquire into the case law to give at least a semblance of specificity to what would otherwise be general and abstract constitutional principles.

These basic, simple principles worked well here. The officers did not go unpunished. In finding a constitutional violation, the panel allowed the plaintiff to proceed before a jury on his state due process claim for which Maryland provides no qualified immunity defense. *Robles*, 302 F.3d at 273. The district court believed that the first jury's award of well over a half a million dollars for a 10-minute incident in which there was probable cause to arrest and no evidence of verbal or physical abuse was too high. It offered the plaintiff $ 240,000 or the opportunity for a new trial, a course which is well settled under our precedent. Id. at 268. Plaintiff could have taken the $ 240,000 and banked it. Instead, he decided to roll the dice. An extensive trial was held on the issue of damages and the jury came back with an award of $ 40,000. *Id.* The panel upheld the jury award. What it was not prepared to do, however, was relieve the plaintiff of the consequences of a strategic decision that in hindsight the plaintiff wished he had made differently.

This was, in short, a case in which the system worked. It makes good sense to allow state law to hold officers to strict account while the parameters of federal violations are fairly defined. Moreover, the proper precedent has been established for the future. Police officers have been put on the clearest notice in this circuit that even brief episodes of foolishness

implicate due process guarantees. And the plaintiff has had his day in court -- and indeed recovered -- on the very claim he is now complaining about.*

The basic point, however, pertains to the simple fairness of giving even unpopular parties proper notice. The Supreme Court requires that we do so, and we are not at liberty to disregard the discipline of its analysis. In *United States v. Lanier*, 520 U.S. 259, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997), the Court made clear that officers in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as defendants charged with the criminal offense defined in 18 U.S.C. § 242. "The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." Id. at 270-71. Police officers do bad things. Criminal defendants do bad things. But due process of law belongs to both.

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* The dissent asserts that the Fourth Amendment supplies the appropriate analytical framework, rather than the Due Process Clause. This is incorrect. *See Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (en banc). The ill-advised decision to cuff Robles does not eliminate the fact that he was validly arrested and held for an hour prior to the cuffing. The cuffing was part of a crude prisoner transfer, not a fresh seizure or arrest; it was a confinement pending arraignment similar to that in the station house in *Riley*. That fact that Riley was ultimately arraigned while Robles was not in no way changes the analysis.

DISSENT

LUTTIG, Circuit Judge, dissenting from denial of rehearing *en banc*:

I dissent from the court's denial of rehearing *en banc*. Even had the panel straightforwardly applied the proper qualified immunity standards, which it did not, I believe that this case would be worthy of reconsideration by the full court on the relatively fact-specific question of whether these officers are entitled to immunity for their particular actions. Irrespective of any larger doctrinal implications, it is significant when a court of appeals holds, as did this panel, that law enforcement officers today could not reasonably have known that handcuffing a pretrial detainee to a pole in a deserted shopping center, and abandoning him there in the middle of the night, admittedly for no law enforcement purpose whatsoever, would violate his rights under the Constitution. I think it clear that the constitutional impermissibility, not to mention the inherent danger of such, is sufficiently self-evident to require the denial of qualified immunity to the defendant officers. But because of what are in fact the much larger implications of the panel's breathtaking expansion of the qualified immunity doctrine and resulting constriction of 42 U.S.C. § 1983, I believe the case is an especially appropriate candidate for further review by the entire court.

It is on the *assumption* that appellant's restraint was in violation of his rights as a pretrial detainee under the Fourteenth Amendment that I believe this case merits full court review for the foregoing reasons. I believe that the case is also deserving of *en banc* reconsideration, however, for the

entirely unrelated, but equally fundamental, reason that the panel erred in holding that appellant did not suffer a violation of his Fourth Amendment rights to be free from unreasonable seizure, but, rather, a violation of his due process rights not to be punished prior to valid conviction and sentence. Properly viewed, appellant was not at all a detainee being held pending trial. Rather, handcuffed to a metal pole in a shopping center and intentionally abandoned by the arresting officers, appellant was an ordinary citizen subjected to an unconstitutional restraint.

I.

The undisputed facts are as follows. Officers of the Prince George's County Police Department arrested appellant on an outstanding traffic warrant from Montgomery County. Thereafter, at three o'clock in the morning, these sworn officers handcuffed appellant to a metal pole, in the middle of a deserted shopping center, and left him there, after anonymously notifying the Montgomery County Police Department that someone had handcuffed a person to a pole in the Hillandale Shopping Center. Appellant remained handcuffed to the shopping center pole for some time even after Montgomery County officers arrived at what they understood to be a crime scene, because of an inability to sever the handcuffs by which appellant was restrained. While the total time during which appellant was tied to the pole does not appear in the record, the delay prior to the arrival of the summoned officers was approximately 10-15 minutes and appellant remained tied to the pole for a sufficient time thereafter for a crimescene photographer to be called, travel to the site, and record the scene. *See Transcript of the District Court's Summary Judgment Motions Hearing* at 3, 18, and 22

(Oct. 25, 1999) [hereinafter *Summary Judgment*]. During the time that appellant was handcuffed to the pole, according to the panel, he "did not know when or if anyone would come to rescue him or who might discover him." *Robles v. Prince George's County*, 302 F.3d 262, 270 (4th Cir. 2002). As the panel concluded, the officers "clearly appreciated the wrongfulness of their actions" and "freely admitted that their motive was unrelated to any legitimate law enforcement function." Id. at 273.

Notwithstanding these conclusions, the panel granted the officers full immunity for this unconstitutional conduct on the startling ground that law enforcement officers could not reasonably have been expected to know that handcuffing a pretrial detainee to a metal pole in a deserted shopping center at three o'clock in the morning, and abandoning him there, concededly for no law enforcement purpose whatsoever, would violate his rights under the Constitution.

In affirming the judgment below, the panel concluded that the district court had struck "a fortunate balance" "in this unfortunate case," *id.*, reaching that disposition that represented the "justice of the case." Id. at 266-67. Said the panel in summation, "the district judge wisely let neither party have its way." Id. at 273-74.

I confess ignorance as to where the "justice of the case" lies. But under the law, it is quite clear that these officers are not entitled to immunity for their conduct. Although I would not attempt to do so, it could legitimately be maintained that the conduct at issue did not rise to the level of a constitutional violation at all (which is what the panel really seems to have believed), either because of its character

as prank or because of the relative insignificance of the injuries. But it has now been almost a quarter century since the Supreme Court held in *Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), that the official treatment of pretrial detainees that causes greater than *de minimis* injury and has *no* legitimate governmental purpose whatsoever amounts to unconstitutional punishment. *Id.* at 538-39; *see also Whitley v. Albers*, 475 U.S. 312, 322, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986)(noting that the deference courts accord officers when deciding if conduct was reasonably related to a legitimate purpose "does not insulate from review actions taken in bad faith and for no legitimate purpose"). And, in the intervening years, the Court has been unwavering in its commitment to this principle. This long after *Bell* v. *Wolfish*, it simply is analytically indefensible to hold that the particular conduct of these officers violated appellant's rights under the Fourteenth Amendment *for the reasons that the officers' conduct served no law enforcement purpose whatsoever and inflicted more than de minimis injury*, and at the same time to hold that the officers are nonetheless entitled to official immunity for their unconstitutional conduct because they could not reasonably have known that their conduct was forbidden by the Constitution.

The panel here concluded, without reservation, that the defendants' treatment of appellant served absolutely no legitimate law enforcement purpose:

> The police behavior here was not reasonably related- indeed it was entirely unrelated -- to any legitimate law enforcement purpose. Nothing the officers did served to enhance their own safety or the safety of others, or to

> ensure the presence of plaintiff at trial. Moreover, it was hardly necessary to tie someone to a metal pole in a deserted park ing lot, for however brief a time, in order to effect a transfer of custody. The officers' actions thus served no conceivable law enforcement purpose . . . .

Robles, 302 F.3d at 269. In fact, *the defendants did not even attempt to justify their treatment of appellant on the basis of a legitimate law enforcement purpose*. *Id.* ("[T]he defendants . . . decline to justify their behavior on [the basis of a law enforcement purpose]."); *id.* at 273 ("[the officers] have freely admitted that their motive was unrelated to any legitimate law enforcement function").

The panel concluded that appellant suffered more than *de minimis* injuries as a result of the defendants' "arbitrary and purposeless" conduct:

> Robles was tied up in a dark and deserted location in the middle of the night. He did not know when or if anyone would come to rescue him or who might discover him. The resulting injury was more than de minimis.

Id. at 270.

And it even explained that the defendants "clearly appreciated the wrongfulness of their actions," *id.* at 273, those actions having even been in "violation [of] police regulations as well as state law," *id.* at 271. It follows inescapably from the composite of these facts and

conclusions, not only that the defendants violated appellant's Fourteenth Amendment rights as a pretrial detainee (as the panel held), but also that they forfeited their official immunity because of their knowing violation of clearly established law (as the panel refused to hold). Indeed, so clear do I believe it to be that conduct like that at issue here is prohibited by the Constitution, that I would think it an affront to law enforcement officers to be told that they would *not* reasonably know that such conduct was violative of a detainee's rights.

Such is not to say that in every case in which a detainee's Fourteenth Amendment rights, as defined by the Court in *Bell* v. *Wolfish*, have been violated immunity will be unavailable and official liability will attach. In some cases, officers who injure detainees through conduct which, it is subsequently determined, served no legitimate law enforcement purpose and inflicted more than *de minimis* injury, will yet be entitled to immunity on the ground that the officers reasonably, but mistakenly, believed that their conduct was in service of a legitimate law enforcement purpose or would not have inflicted more than *de minimis* injury. However, on the panel's own terms, this is not such a case. These officers did not even attempt to defend their actions on the ground that they were in furtherance of a legitimate law enforcement purpose or could not have reasonably been expected to inflict injury.

I cannot help but believe that the panel's fundamental error lay in its attempt (candidly undertaken and, doubtless, well-intentioned) to discern the "justice of the case." Having held that appellant's non-*de minimis* injuries were sustained as a result of treatment that served no law enforcement purpose whatsoever, and therefore that appellant's rights under the

Due Process Clause had been violated, the panel's concern for "striking the just balance in the case" caused it to jettison its theretofore rigorous analysis, and the very inquiry which, at the outset of its qualified immunity analysis, it correctly identified as the one that it was required to undertake -- namely, whether appellant's right not to be subjected to serious injury by official conduct that is not in service of a legitimate law enforcement purpose was clearly established at the time of the incident in question. *Compare Robles*, 302 F.3d at 270 ("Because the officers' actions were not reasonably related to any law enforcement purpose and Robles suffered more than de minimis injury as a result of these actions, Robles' Fourteenth Amendment right to due process was violated."), with *id.* ("Even though the officers' actions deprived Robles of an actual constitutional right, Rozar and DeBarros may still be entitled to qualified immunity if *that right* was not clearly established at the time of the incident.")(emphasis added).

Rather than conducting this proper qualified immunity inquiry, the panel instead, with citation to *Anderson v. Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), simply admonished without elaboration that "a greater degree of specificity [*i.e.*, greater than simply alleging that conduct amounts to punishment] is required to overcome a defense of qualified immunity," *Robles*, 302 F.3d at 270. And then, without even so much as a further mention of the right, much less a discussion of the level of specificity at which the right ought to be defined, it merely recited that there are no cases factually on all-fours with the instant case, and concluded that the defendants *therefore* could not possibly have understood that their conduct violated appellant's rights.

Although its award of qualified immunity necessarily entails such a holding, so expedient is the panel's analysis on the qualified immunity question that it never even directly states the conclusion that the officers *could not have reasonably known* that their conduct was violative of the Constitution, a statement which, if made, perhaps would have jarred the sensibilities. *See, e.g., id.* at 271 ("Although the officers' actions in this instance were foolish and unorthodox, *it is also not clear that* at the time they acted they should have reasonably known that their conduct violated [appellant's] constitutional rights.") (emphasis added). Indeed, if one carefully reads the panel's qualified immunity analysis, it appears that the panel did not even award these officers immunity on a basis justified in law. The fairest (if not only) inference from what the panel wrote is that it afforded the officers immunity, not at all on the ground that the officers could not reasonably have known that their conduct violated appellant's constitutional rights, the only ground upon which it could legitimately have done so. Rather, it appears that the panel actually granted qualified immunity either on the wholly *illegitimate* ground that the officers did not *subjectively* understand that their conduct violated clearly established law, or on the wholly *irrelevant* ground (irrelevant, that is, to the qualified immunity claim, as opposed to the threshold claim that the officers violated appellant's due process rights) that the conduct *did not rise to the level of a constitutional violation*:

> The officers should have known, and indeed did know, that they were acting inappropriately. *But whether they understood their conduct violated clearly established federal law is an altogether different question.*

> The Constitution is not a "font of tort law" to be "superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). The officers' conduct violated police regulations as well as state law and was dealt with under those provisions. ***But not every instance of inappropriate behavior on the part of police rises to the level of a federal constitutional violation.***

302 F.3d at 271 (emphases added).

In any event, having altogether bypassed the proper qualified immunity inquiry through this sequence of analytical nonsequitur, the panel left itself only with the comfortable task of rejecting what was by that time the strawman argument that cases decided on facts similar to those here clearly established that the defendants' conduct was violative of the Constitution. Unsurprisingly, because of the infrequency (to say the least) of such conduct, the panel found no cases that have held that handcuffing a pretrial detainee to a pole in a deserted shopping center in the wee hours of the morning, and abandoning him there, all admittedly for no law enforcement purpose whatsoever, is unlawful. And it found "inapposite" the facts of those few distant authorities that it cited as closest on their facts to those here, authorities which would have been distinguishable in any event because they addressed only whether specific conduct was reasonably related to a legitimate purpose -- a question that does not even present itself in this case because the defendants' conduct concededly had *no* legitimate law enforcement purpose.

It should be apparent that I do not believe that a decided case is necessary in order for officers to be on fair notice that conduct like that by the officers here is violative of the Constitution. *See generally Wilson v. Layne*, 526 U.S. 603, 615, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999)(holding that the precise conduct need not have been previously held unlawful in order for qualified immunity to be forfeited); *see, e.g., Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001)(denying qualified immunity and rejecting argument that previously decided case must have held that barehanded penetration of female genitalia during pat down search was unconstitutional); *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996)(denying qualified immunity to officials who confined pretrial detainee on death row before his trial in order to punish him, despite the absence of any factually-similar precedent). And I would like to have thought that at this point in our history no court would hold, as did this panel, that law enforcement officers need an opinion from this court in order for them to be on notice that handcuffing a pretrial detainee to a metal pole in a deserted shopping center at 3:00 a.m. in the morning, and abandoning him there, *for no law enforcement purpose at all*, is unconstitutional. The sheer danger, not even to mention the constitutional irresponsibility, of such conduct is manifest as a simple matter of common sense, and is made all the more evident by events such as the recent spree of unpredictable sniper killings in the Washington, D.C., metropolitan area, which have even reached to *the identical shopping center in which appellant was handcuffed*. Such a holding as that of the panel analytically completes the transformation of qualified immunity into absolute immunity and goes a long way toward the dilution of section 1983 itself. It is rich irony, therefore, that the panel rhetorically asserts precisely the opposite in support of its conclusion. *See Robles*, 302 F.3d at 270

(stating, without elaboration, that the denial of immunity to the officers in this case would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability")(citation omitted).

But, if decided authority is required, the panel would have found that authority extant, in the form of the Supreme Court's decision in *Bell* v. *Wolfish*, had it simply proceeded to inquire, as it originally said that it must, whether a pretrial detainee's right not to be injured by officials acting as did these officers was clearly established at the time of the incident. Faced foursquare with *Bell* v. *Wolfish*, the panel's answer on the immunity question assuredly would have been different.

Had it paused to consider seriously whether, as to the conduct here at issue, the particularized standards set forth by the Supreme Court in *Bell* v. *Wolfish* constituted sufficiently clearly established law, the panel would not have been able to reject so dismissively appellant's argument. Contrary to the panel's characterization of appellant's claim, *see Robles*, 302 F.3d at 270 -- a characterization that enabled easy rejection -- appellant did not assert merely the violation of his right as a detainee not to be punished. Rather, he asserted the considerably more specifically-defined right, per *Bell* v. *Wolfish*, not to be seriously injured as a result of official conduct that serves no legitimate law enforcement purpose. The difference between the specificity of this right and that to "due process of law," which was held by the Court in *Anderson v. Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), to be insufficiently specific to provide officials with adequate notice, could hardly be any greater. And the contours of this right are more than sufficiently

apparent to place officers on notice *at least* that the conduct engaged in by these defendants violated the Constitution. To hold otherwise, as the panel did, *see Robles*, 302 F.3d at 270, *is*, as appellant maintains in his petition for rehearing *en banc*, tantamount to holding that "the very action in question [must] previously [have] been held unlawful," *Wilson v. Layne*, 526 U.S. at 615 -- the panel's disclaimer that it did not so hold notwithstanding.

In sum, the panel begins and ends its opinion with the assurance that justice has been done in this particular case. In the sense that the term is invoked by the panel, I do not know whether the "just" result of this dispute is in a splitting of the baby, as the panel concluded. Or whether the more equitable result would instead be for us to hold that the defendants did not even violate appellant's rights under the Constitution. Or, for that matter, for us to hold that the officers both violated the appellant's rights and forfeited their otherwise applicable immunity. I am not even sure how to go about deciding what "justice" might require in this case.

However, under the applicable law it is clear not only that these defendant officers violated appellant's rights as a pretrial detainee, but also that they are not entitled to immunity for their actions, for they were in violation of clearly established law of which they not only reasonably should have been aware, but actually were aware. And in this case, as in all others, justice, in the only sense that matters, is done when we reason to that conclusion which is dictated by the particular rule of law applicable under the circumstances. We have the rule of law precisely because we recognize that, as human beings, we do have different notions of what constitutes "justice" in given circumstances, but agree

that the determination of our rights and the protection of our liberties must not turn upon those individual notions, for one man's "justice" is another's deprivation of right.

II.

I have, until this point, addressed myself to the panel opinion on the assumption that it correctly analyzed the officers' actions as a pretrial detention, rather than as a Fourth Amendment seizure, because of the significance to the law of the panel's holding that the defendants are immune for their unconstitutional conduct under the Fourteenth Amendment. However, I actually believe that the panel *entirely* misapprehended the case from the beginning by characterizing the officers' restraint of appellant as a pretrial detention, rather than as a Fourth Amendment seizure.

It is clear that, following his abandonment in the Hillandale Shopping Center by the Prince George's County police officers, appellant's restraint was not in any sense at all a condition of confinement, contrary to the panel's critically unexamined assumption. Upon abandonment of appellant, the Prince George's County police *terminated* their pretrial detention of appellant (and obviously at that time appellant was not in the custody of the Montgomery County police officers). The restraint of appellant thereafter, in the absence of a legitimate law enforcement purpose, constituted an unreasonable seizure in violation of the Fourth Amendment, not a condition of pretrial confinement.

That the officers terminated their pretrial detention of appellant is evident from their actions. But it is also apparent from their testimony that this was exactly what they intended

to do. The officers frankly testified in depositions that they left appellant in the shopping center parking lot for the very purpose of terminating their detention of him and ending their responsibility for his custody and care. The officers, attempting informally to transfer the prisoner to the Montgomery County police, were told by officials of that jurisdiction to "process him" or "release him." The Prince George's County officers responded by declaring that they would not process him, and so would release him, *see Summary Judgment* at 35. Indeed, on the night in question, the officers reported to their own dispatcher that appellant was a "300 SOW," a police code meaning "Sent On Way" (*i.e.*, the officers released the detainee, sent him on his own way, and no further action was being taken). *See id.* at 55.

When, as here, officers decide to cease to secure an arrestee's presence at trial and in fact terminate their detention of that arrestee without relinquishing custody to other law enforcement personnel, any further restriction of the individual's liberty constitutes a new seizure, as such restriction can no longer be legally based on the prior seizure. Thus, at the moment following the Prince George's County officers' abandonment of appellant, handcuffed to the shopping center pole, appellant was, as a matter of law, seized anew, a seizure for which was required a valid law enforcement reason, such as probable cause or reasonable suspicion. Of course, as we know, that seizure was not justified by any law enforcement purpose, it having been, as the panel concluded, completely arbitrary and purposeless. It follows, therefore, that the defendants violated appellant's Fourth Amendment rights to be free from unreasonable seizure.

Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997), on which the panel relied for its holding that appellant was not unlawfully seized, neither supports that holding nor stands as authority foreclosing the proper holding that it was appellant's Fourth Amendment rights that were violated. It does not support the panel's holding, because appellant here, unlike the appellant in that case, plainly was not being held for trial. *Compare id.* at 1161 (noting that appellant was "being held prior to a formal adjudication of guilt"). Thus, no "broadening [of] Fourth Amendment protection beyond the point of arrest to cover all persons *in pretrial detention*," *id.* at 1162 (emphasis added), would be entailed by the holding that appellant was subjected to an unlawful seizure in violation of the Fourth Amendment.

By the same token, *Riley* does not, as the panel in error believed, foreclose the correct holding that appellant was unlawfully seized, because such holding does not in any way depend upon recognition of a "concept of continuing seizure." *Compare Robles*, 302 F.3d at 268 (citing *Riley* for the proposition that "this court has rejected any concept of a continuing seizure rule"). The unlawful seizure of appellant was complete, as I suggest above, at the moment following appellant's abandonment, handcuffed to the pole, by the defendants, because at that moment appellant was restrained for reasons wholly unrelated to any valid law enforcement purpose.

III.

For the reasons stated, I would grant the petition for rehearing *en banc* and set this case for reargument before the full court to consider the significant holdings by the panel that

the officers in this case could not reasonably have known that their conduct denied appellant his rights under the Fourteenth Amendment, and that appellant did not suffer an unreasonable seizure in violation of the Fourth Amendment's proscription against unreasonable searches and seizures. And I would hold that the panel fundamentally erred in both of these holdings. Accordingly, I respectfully dissent from my colleagues' denial of rehearing *en banc*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1662, No. 01-1728

[Filed August 26, 2002]

NELSON O. ROBLES,
Plaintiff-Appellant,

v.

PRINCE GEORGE'S COUNTY, MARYLAND; JAMES ROZAR; ANTONIO DEBARROS,
Defendants-Appellees.

NELSON O. ROBLES,
Plaintiff-Appellee,

v.

PRINCE GEORGE'S COUNTY, MARYLAND; JAMES ROZAR; ANTONIO DEBARROS,
Defendants-Appellants.

Appeals from the United States District Court
for the District of Maryland, at Greenbelt
Peter J. Messitte, District Judge
(CA-99-31-PJM)

Before WILKINSON, Chief Judge, MOTZ, Circuit Judge, and Bobby R. BALDOCK, Senior Circuit Judge of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

OPINION

WILKINSON, Chief Judge:

Plaintiff Nelson Robles claims that police officers Antonio DeBarros and James Rozar violated his state and federal constitutional rights by tying him to a metal pole in a deserted parking lot and abandoning him there for approximately 10 minutes. He seeks damages from the officers and from Prince George's County, Maryland ("PGC") pursuant to 42 U.S.C. § 1983, as well as under the Maryland Constitution and state law for the intentional infliction of emotional distress. The district court granted summary judgment to the officers on the federal claims on the basis of qualified immunity and on the emotional distress claim as a matter of law. A jury found for Robles on the state due process claim and awarded compensatory and punitive damages in the amount of $ 647,000. The district court granted a remittitur of the damage awards to $ 240,000, or in the alternative a new trial. Robles opted for a new trial limited to the amount of damages and was awarded $ 40,000.

On appeal, defendants contend that the brief restraint of plaintiff was nothing more than a prank that, however misdirected, did not rise to the level of a constitutional violation. Plaintiff contends in turn that the damages he suffered for this indignity merited far more than the monies he received. The district court and the jury in its final award

correctly perceived that the justice of the case lay somewhere in between. For the reasons that follow, we affirm in large part and remand with directions to modify the judgment only to the extent of reversing the award of punitive damages against the county because such damages are impermissible under Maryland law.

I.

At approximately 3:30 a.m. on August 17, 1996, PGC police officers Antonio DeBarros, Kevin Hodge, and Lt. James Rozar responded to a disorderly conduct noise complaint at an apartment complex in Langley Park. Upon obtaining identification from three men found drinking beer on the premises, the officers arrested Nelson Robles on an outstanding traffic warrant issued by neighboring Montgomery County.

After taking Robles into custody, the officers attempted to arrange a prisoner exchange with Montgomery County's police department. Formal custody transfers generally require that the arrested individual be taken to a commissioner in the county where arrested and then transferred by the sheriff's department to the county that issued the warrant. Because this procedure is time consuming, officers sometimes arrange informal transfers of arrestees at the county line. Rozar and DeBarros requested several times that the Montgomery County dispatcher send someone to meet them for such an exchange, but these requests were denied. The officers were told that the Montgomery County Police Department was too busy that evening to spare officers for a transfer.

Skeptical of this explanation, Rozar and DeBarros drove Robles to the deserted Hillandale Shopping Center parking lot in Montgomery County. There they tied Robles to a metal pole using three pairs of flex-cuffs and left a note at his feet explaining that there were outstanding warrants for him in Montgomery County. The officers then drove out of sight of Robles and placed a call to the non-emergency number of the Montgomery Police Department reporting the situation. They did not identify themselves to the operator or disclose the fact that PGC officers had tied Robles to the pole. Officers from Montgomery County arrived approximately 10 to 15 minutes later to untie Robles and take him into custody.

On October 26, 1998, Robles filed a nine-count complaint against Rozar, DeBarros, and PGC alleging violation of his civil rights under both the Maryland and U.S. Constitutions, as well as intentional infliction of emotional distress under state law. The case was removed to federal court in January 1999. The district court then granted defendant's motion to bifurcate and stay discovery as to Count IX which alleged direct liability against the county for the unlawful seizure pursuant to *Monell v. Department of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

Defendants filed a motion for summary judgment as to Counts I through VIII, which the court granted in part and denied in part. Specifically, the court held that defendants possessed qualified immunity as to Counts II-IV, which asserted liability under 42 U.S.C. § 1983, but that Counts V-VIII, alleging violation of Robles' rights under the Maryland Constitution, survived because Maryland law provides no official immunity for state constitutional violations. The court

also granted summary judgment to defendants on Count I, the intentional infliction of emotional distress claim, because Robles could not establish the elements of the tort as a matter of law.

Counts V-VIII were tried to a jury, which returned a verdict in Robles' favor on the state constitutional due process claim. The jury awarded Robles $ 647,000 in compensatory and punitive damages. Robles filed a motion to alter judgment, or alternatively for a new trial, arguing that the jury's verdict was contrary to law because it failed to find, in addition to the state due process violation, that he had been subject to an unconstitutional seizure under Maryland law. The court denied the motion following a hearing. Robles also filed a motion for reconsideration of the court's order granting defendants' motion for summary judgment on the basis of qualified immunity with regard to the § 1983 claims. The court denied that motion as well.

The district court subsequently granted defendants' motion for remittitur, or in the alternative a new trial, based on excessiveness of the verdict. Robles rejected the court's remittitur of the award to $ 240,000. The second trial was limited to the issue of damages for the violation of Robles' state constitutional right to due process. The jury awarded Robles $ 25,000 in compensatory damages against Rozar, DeBarros, and PGC. It awarded $ 5,000 in punitive damages against Rozar and $ 10,000 in punitive damages against PGC. On May 9, 2001, the parties filed a stipulation of dismissal of the *Monell* claim against PGC.

Robles filed a motion to recover his attorneys' fees and expenses under 42 U.S.C. § 1988. He argued that in view

of the jury award in his favor, he was the "prevailing party." Defendants responded that Robles was not the prevailing party for purposes of § 1988 because he had not succeeded on any of his federal claims. The court agreed with defendants and denied Robles' motion to award attorney's fees. Robles appeals.

II.

We begin by considering Robles' federal constitutional claims. In order to make out a valid claim under 42 U.S.C. § 1983, Robles must show that (1) the actions of the police officers deprived him of an actual constitutional right and (2) that the right was clearly established at the time of the alleged violation. *Wilson v. Layne*, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). Only if both parts of this inquiry are satisfied can Robles overcome the defendants' assertion of qualified immunity. *Id.*

A.

Robles contends that the PGC officers violated his constitutional right to be free from unreasonable seizures. He asserts that "because there was no legitimate reason to handcuff [him] to a pole and abandon him, the manner of his seizure was unreasonable."

The Fourth Amendment "governs claims of excessive force during the course of an arrest, investigatory stop, or other 'seizure' of a person." *Riley v. Dorton*, 115 F.3d 1159, 1161 (4th Cir. 1997) (en banc). However, this court has rejected any concept of a continuing seizure rule, noting that "the Fourth Amendment . . . applies to the initial decision to

detain an accused, not to the conditions of confinement after that decision has been made." *Id.* at 1163 (internal citations and punctuation omitted). Once the single act of detaining an individual has been accomplished, the Amendment ceases to apply. *Id.*

Robles acknowledges that the police had probable cause for his arrest. The officers were acting on the basis of an outstanding warrant issued by Montgomery County which contained five charges against Robles stemming from a vehicular hit and run accident the previous year. Robles also admits that Rozar and DeBarros did not use excessive force when they took custody of him. The officers made clear the reason for his arrest, handcuffed him, and placed him in the back of a police cruiser without incident.

Thus, by the time Robles was brought to Montgomery County, his arrest had been completed and the circumstances of that arrest comported with Fourth Amendment safeguards. Robles' status at the time of this incident was that of a pretrial detainee, and the Fourth Amendment does not extend to such situations.[1] Such a detainee may assert other rights, of course, and it is to those that we now turn.

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[1] Robles additionally contends that the court below erred in not granting his motion to alter judgment on the related state law claim. Because Article 26 of the Maryland Declaration of Rights and the Fourth Amendment of the U.S. Constitution parallel each other, *Henderson v. Maryland*, 89 Md. App. 19, 597 A.2d 486 (Md. App. 1991), the jury verdict for the defendants on this claim must stand.

B.

As a pretrial detainee, Robles' treatment and the conditions of his restraint are evaluated under the Due Process Clause of the Fourteenth Amendment. *Riley*, 115 F.3d at 1166. In order to conclude that Robles' rights under this clause were violated, it is necessary to find that the officers' actions amounted to punishment and were not merely "an incident of some other legitimate governmental purpose," *Bell v. Wolfish*, 441 U.S. 520, 538, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), and that the injury resulting from their actions was more than de minimis.[2] *Riley*, 115 F.3d at 1167.

Defendants contend that their actions cannot amount to punishment because they "failed to show any expressed intent" to punish and the "purpose of [their] actions was to insure that the [transfer of] custody" be effected. In the absence of an actual intent to punish, however, the due process determination turns on whether the "pretrial detention is reasonably related to a legitimate governmental objective" or "if it is arbitrary or purposeless." *Bell*, 441 U.S. at 539. An action may be reasonably related to a legitimate governmental purpose if "an alternative purpose to which [the act] may rationally be connected is assignable for it" and the

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[2] Plaintiff would have us dispose of this issue by reference to the Supreme Court's recent ruling in *Hope v. Pelzer*, 153 L. Ed. 2d 666, 122 S. Ct. 2508, 2002 WL 1378412 (U.S.). In that case, the Court found an Eighth Amendment violation when a prison inmate was tied to a hitching post for extended periods of time. That case involved a much lengthier detention under painful and dangerous conditions amounting to cruel and unusual punishment. It is therefore not dispositive of this claim.

action does not appear "excessive in relation to the alternative purpose assigned." *Id.* at 538 (internal quotes and citation omitted).

The police behavior here was not reasonably related -- indeed it was entirely unrelated -- to any legitimate law enforcement purpose. Nothing the officers did served to enhance their own safety or the safety of others, or to ensure the presence of plaintiff at trial. Moreover, it was hardly necessary to tie someone to a metal pole in a deserted parking lot, for however brief a time, in order to effect a transfer of custody. The officers' actions thus served no conceivable law enforcement purpose, and the defendants in fact decline to justify their behavior on that basis. Even a so-called prank that fails to serve any "legitimate governmental objective" can constitute a due process infraction. *Id.* at 539. Even if the officers' action here might be seen as merely immature, it is not any less a constitutional violation.

Lastly, for Robles' rights to have been violated by this arbitrary and purposeless act, he needs to have suffered more than a de minimis injury. *Riley*, 115 F.3d at 1167. Robles testified that he felt frightened, vulnerable, and humiliated when left alone and immobile in the dark parking lot. He asserts that in the months following the incident he had trouble sleeping and was scared to leave his home. Three corroborating witnesses testified to an abrupt change in Robles' daily habits immediately following the incident. The defendants respond that "being upset or disappointed regarding how one is treated by a police officer cannot amount to anything more than a *de minimis* injury." They argue that their actions caused no more than minor anxiety which should not be compensable.

While Robles' injury certainly needs to be "something more than trifling," *Riley*, 115 F.3d at 1167, "mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983." *Carey v. Piphus*, 435 U.S. 247, 264, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978). And while a litany of subjective complaints may not be more than de minimis, *Riley*, 115 F.3d at 1167-68, any reasonable person would have been upset by what happened here. Robles was tied up in a dark and deserted location in the middle of the night. He did not know when or if anyone would come to rescue him or who might discover him. The resulting injury was more than de minimis.

Because the officers' actions were not reasonably related to any law enforcement purpose and Robles suffered more than a de minimis injury as a result of these actions, Robles' Fourteenth Amendment right to due process was violated.

C.

Even though the officers' actions deprived Robles of an actual constitutional right, Rozar and DeBarros may still be entitled to qualified immunity if that right was not clearly established at the time of the incident. *Wilson*, 526 U.S. at 609. Police officers performing discretionary acts "generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (citations omitted). Thus, liability in this case turns on what notice the PGC officers had that their conduct violated federal constitutional law.

Robles contends that his rights under the Due Process Clause were clearly established by *Bell*. He asserts that a "reasonably well trained officer in the position of the defendants would have known that it was unconstitutional to subject an individual to conditions amounting to punishment." However, as the district court recognized, a greater degree of specificity is required to overcome a defense of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). Without such a requirement, "plaintiffs would be able to convert the rule of qualified immunity that [the] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*

Although notice does not require that the "very action in question has previously been held unlawful," it does mean that "in the light of pre-existing law the unlawfulness must be apparent." *Wilson*, 526 U.S. at 615 (citation omitted). The cases cited by plaintiff on this point are inapposite. They involve instances where detainees were subject to physical abuse or prolonged and inhumane conditions of detention. *See Putnam v. Gerloff*, 639 F.2d 415 (8th Cir. 1981) (plaintiffs handcuffed together and left in sitting position for 12 hours); *Fisher v. Wash. Metro. Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982) (plaintiff detained naked in view of members of the opposite sex); *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987) (plaintiff tied to chair for an entire school day). Although the officers' actions in this instance were foolish and unorthodox, it is also not clear that at the time they acted they should have reasonably known that their conduct violated Robles' constitutional rights.

The officers should have known, and indeed did know, that they were acting inappropriately. But whether they understood their conduct violated clearly established federal law is an altogether different question. The Constitution is not a "font of tort law" to be "superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). The officers' conduct violated police regulations as well as state law and was dealt with under those provisions. But not every instance of inappropriate behavior on the part of police rises to the level of a *federal* constitutional violation. Going forward, officers are now on notice that the type of Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose implicates federal due process guarantees. Going backward, however, and imposing retrospective liability would eviscerate the requirement of notice at the core of the qualified immunity defense.

III.

Robles next contends that the district court abused its discretion under Fed. R. Civ. P. 59(a) when it reduced the jury's combined compensatory and punitive damage awards of $ 647,000 and in the alternative ordered a new trial. Robles rejected the court's remittitur of $ 240,000 and opted for a new trial where the jury awarded him $ 40,000 in compensatory and punitive damages.

The decision as to whether damages are excessive and should be subject to remittitur is "entrusted to the sound discretion of the district court," and such determinations "will be reversed on appeal only upon a showing of abuse of

discretion." *Cline v. Wal-Mart Stores*, 144 F.3d 294, 305 (4th Cir. 1998). In accordance with this standard, this Court will "give the benefit of every doubt to the judgment of the trial judge." *Id.* (internal citation omitted).

Although Robles asserts that the lower court "did not articulate any meaningful reason for the reduction" in compensatory damages from $ 150,000 to $ 80,000, the court in fact gave a number of reasons for its decision. Those factors included the brevity of Robles' detention, the absence of any physical abuse, and that, although Robles did suffer from emotional distress, no medication or counseling was required to resolve it. The record amply supports the district court's perspective. Plaintiff never made any claim for lost wages or medical treatment in connection with this 10 minute incident, nor did he see any type of doctor about it until three years later on the advice of his lawyer. Finding the jury's award of $ 150,000 in compensatory damages to be excessive lay within the discretion of the district judge.

With respect to the punitive award, Robles contends that the Court erred in not considering the seven factors listed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991), for assessing the excessiveness of punitive awards. However, the Supreme Court in that case was merely passing judgment on the sufficiency of the factors used by Alabama courts to safeguard parties' rights, not prescribing a test to be used by all courts. It is well established that remittitur should be ordered when the jury award will "result in a miscarriage of justice." *Cline,* 144 F.3d at 306. Here, the same underlying factors which led to the reduction of the compensatory award -- the brevity of detention, the total absence of any physical abuse, and the

lack of any treatable mental or emotional condition -- also supported the district court's view that "it would be a miscarriage of justice to impose punitive damages higher than" $ 160,000. The lower court properly assessed the punitive award against the *Cline* standard in finding the $ 497,000 award to be excessive.

IV.

We next turn to Robles' claim that the lower court erred in refusing to award attorney's fees under 42 U.S.C. § 1988. Under The Civil Rights Attorney's Fees Awards Act of 1976, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" of bringing a § 1983 action. 42 U.S.C. § 1988(b). We review the district court's denial of fees for abuse of discretion. *Johnson v. City of Aiken*, 278 F.3d 333 (4th Cir. 2002).

In *Johnson*, the court considered the case of several plaintiffs who recovered damages against an individual police officer and the City of Aiken for an unlawful assault and vehicular search by city police officers. Most of the plaintiffs' federal claims were dismissed on the basis of qualified immunity, and they recovered only nominal damages of 35 cents on the sole surviving federal count. *Id.* at 336. Even though plaintiffs received a substantial monetary award on their pendent state law claim, the court found that they were not prevailing parties entitled to collect attorney's fees under § 1988. *Id.* at 338.

Robles contends that he is entitled to an award of his attorney's fees because he prevailed on his state law due process claim. But, "plaintiffs who do not prevail on their

federal claims but achieve success on supplemental state law claims are not prevailing parties under § 1988, and are therefore not entitled to an award under that statute.", *Id.* at 336. Robles' Fourth Amendment and Due Process claims were dismissed on summary judgment. His *Monell* claim was voluntarily dismissed, and thus never addressed by the district court. Robles did not prevail on any federal claims and the district court did not abuse its discretion in denying him attorney's fees.

V.

We now turn to the issues raised by defendants in their crossappeal. We first examine defendants' contention that the district court should have dismissed Robles' state constitutional claims. We believe, however, that the jury was entitled to find defendants violated Robles' Article 24 right to due process under the Maryland Constitution.

Article 24 and the Fourteenth Amendment of the U.S. Constitution are construed as parallel with each other. *Williams v. Prince George's County*, 112 Md. App. 526, 685 A.2d 884, 895 (Md. App. 1996). Since officers Rozar and DeBarros did violate Robles' due process right under the Fourteenth Amendment, they likewise violated his state constitutional right under Article 24. Robles' federal constitutional claim failed because the officers were entitled to qualified immunity under federal law. However, "in Maryland, qualified immunity does not apply to constitutional claims." *Id.* at 894. Thus, the jury was entitled to find for Robles on his state due process claim.

VI.

Lastly, we examine defendants' assertion that punitive damages should not have been allowed against either PGC or the individual officers.

A.

Robles argues that punitive damages were properly allowed against PGC. He asserts that the jury found the county liable on a theory of respondeat superior for a malicious constitutional tort committed by Rozar and DeBarros. While such an act may subject the officers to liability for punitive damages, Maryland law disallows any such assessment of punitive damages against a county. Section 5-303(c)(1) of the Local Government Tort Claims Act clearly states that "[a] local government may not be liable for punitive damages." Local Government Tort Claims Act ("LGTCA"), Md. Cts & Jud. Proc. Art. § 5-303(c)(1). Robles contends that the LGTCA applies not to "the County's liability for constitutional torts under the doctrine of respondeat superior" but only to "its duty to indemnify its employees." The Act was amended in 2001 however to make clear that "the total liability of a local government, directly or otherwise, in an action arising from tortious acts or omissions, may not exceed the limits" set by the LGTCA. Md. Acts 2001, c. 286, §§ 2, 3. The amending language, together with the explicit prohibition against the imposition of punitive damages on local governments, requires that we reverse the district court's determination that such damages should be allowed.

B.

While Maryland law shields local governments from liability for punitive damages, a similar protection does not exist for individual officers. Punitive damages are available against individuals upon a showing of actual malice. *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267, 276 (Md. 1998). In Maryland, actual malice means a "sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud." *Id.* (internal citation omitted). Although defendants contend that Robles did not plead sufficient facts to support a showing of actual malice, Robles alleges that "the officers' conduct was wanton and malicious" and that the officers openly "laughed and joked" as they discussed the discomfort they were inflicting on him. The officers clearly appreciated the wrongfulness of their actions, as they attempted to disguise their voices while carrying out their plan and stayed out of sight when the Montgomery police arrived. Additionally, Rozar and DeBarros have freely admitted that their motive was unrelated to any legitimate law enforcement function but was instead a misguided attempt to get back at the Montgomery police officers for refusing to answer their call. Because these actions show actual malice on the part of Rozar and DeBarros, punitive damages against them were proper.

VII.

In this unfortunate case, the district court struck a fortunate balance. While plaintiff sought to push the case for far more than it was worth, defendants seemed to believe that characterizing their actions as adolescent somehow relieved

them of all responsibility for them. The district judge wisely let neither party have its way.

For the foregoing reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded with directions to modify the judgment by eliminating the punitive damages award against the County.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CIVIL NO. PJM-99-31

[October 25, 1999]

NELSON O. ROBLES	)
	)
PLAINTIFF	)
	)
v.	)
	)
JAMES ROZAR, ET AL.,	)
	)
DEFENDANTS	)
	)

The above-entitled case came on for a motions hearing before the Honorable Peter J. Messitte, United States District Judge

APPEARANCES

For the Plaintiff:

Christopher Allen Griffiths, Esquire

For the Defendants:

John Anthony Bielec, Deputy County Attorney
William Snoddy, Deputy County Attorney

Gail A. Simpkins, RPR
Official Court Reporter

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MR. GRIFFITHS: But he knows what 300 SOW means. He is the one that undertakes that. He doesn't report, he doesn't go to someone and say listen, I was out there with Lieutenant Rozar tonight and he told me to do this bad thing. In fact he doesn't go to anyone or tell anyone about this.

I invite the Court to listen to the tone of DeBarros's voice.

THE COURT: Let's wind up, please.

MR. GRIFFITHS: When he codes this out, you can hear in his voice that he is having fun and there is laughter going back and forth.

So, Your Honor, the point being here that there was no proper purpose for what they have done. We have not heard counsel say here today, what the legitimate governmental interest was in tying Mr. Robles to the pole. Really, what it amounted to, Your Honor, was just a complete disregard for Mr. Robles' constitutional rights.

THE COURT: Anything further?

MR. BIELEC: No, Your Honor.

THE COURT: Nelson O. Robles sues Prince George's County and Lieutenant James Rozar and Officer Antonio DeBarros, two members of the county police department.

This complaint is styled in nine counts, Count 1, intentional infliction of emotional distress against the officers, Count 2, a 42 U.S.C., Section 1983 claim against the officers under the Fourth Amendment, Count 3, a 1983 claim for denial of due process under the Fourteenth Amendment, Count 4, a conspiracy count, although that would not be under 1983, but it is under the conspiracy count, which I think is 1985, although it is not mentioned in the complaint.

Conspiracy to violate federal civil rights laws is a separate statute under civil rights law.

Count 5 alleges a violation of the Maryland Constitution, unlawful seizure against the officers, Count 6, a Maryland constitutional violation alleged against the officers, denial of due process, Count 7, conspiracy to violate state civil rights, and Counts 8 and 9, basically the respondeat superior claims against the county.

The defendants have moved for summary judgment.

The complaint alleges that the plaintiff, on August 17, 1996, at approximately 3 a.m., was standing with a group of friends in the courtyard of an apartment complex near 14th Avenue and Kanawah Street in Largley Park, Prince George's County. He was approached by Defendant DeBarros and some unidentified Prince George's County officers. They

were wearing uniforms and operating as police officers.

DeBarros asked plaintiff for identification. DeBarros then was given identification. DeBarros checked the identification through his radio communication and determined that the bench warrants for the plaintiff were outstanding, said now to be some five, one of which was a fleeing from the scene of an accident.

DeBarros was then in the position to take plaintiff into custody, which he did. He cuffed him with handcuffs, put him in the back seat of his cruiser.

Approximately at the time of the arrest, Defendant Rozar, who was a lieutenant in the police department and a senior officer on duty at his district, responsible for supervising officers under his command, including DeBarros, arrived. He was in an unmarked cruiser, it appears, and in civilian clothing, but he was on duty.

There was some discussion of what to do with regard to the custody of plaintiff and how to transfer him to Montgomery County authorities. DeBarros and Rozar attempted to make arrangements to meet with county police officers to do this transfer, but the county officers did not show up at the rendezvous point and so plaintiff remained cuffed in the back seat of DeBarros's cruiser.

When apparently there were no Montgomery County police officers available to make the planned transfer, DeBarros and Rozar determined that they would leave him at the location, which was near the corner of New Hampshire Avenue and Elkton Street in Montgomery County.

They determined that they would leave him restrained in order that he would be found by the police upon their arrival. To do that, Rozar took a set of nylon handcuffs called flexcuffs and cuffed the plaintiff to a metal support pole, using these cuffs which had been obtained from Rozar's vehicle.

Then apparently there was a sign that was either affixed to Robles' shirt or it was put between his legs and it said that he was wanted by the Montgomery County police, and the identification of Robles was put on the ground. DeBarros actually did the cuffing, but Rozar watched and apparently encouraged, directed and so on.

It is not entirely clear whether this detention was for five minutes, ten minutes or fifteen minutes, but eventually, within that range, Montgomery County police Officers came.

DeBarros and Rozar reported the incident. It is clear that they did so anonymously; that is, after perhaps the first contact to try and accomplish the transfer, the telephone call made by Rozar was anonymous. When the Montgomery County police officers arrived on the scene, neither DeBarros nor Rozar came forward, identifying themselves as the county police officers who had effected the cuffing.

Robles contends that he was upset and frightened and has suffered a number of emotional sequelae since that event and his case proceeds in the several counts that I have already referred to.

The defendants defend on a number of grounds, and I will take these seriatim to see where we are with regard to

them. First I will deal With the federal civil rights claims, which are Counts 2, 3 and 4.

There is an allegation that there has been violation of Fourth Amendment rights to be free from unreasonable search and seizures, that being Count 2, and then the Fourteenth Amendment, right to be free from due process violations with regard to pretrial detention.

The defendants argue with regard to those claims that, number one, with regard to the Fourth Amendment actions were not objectively unreasonable as far as what the officers did, and in any event, qualified immunity applies.

Likewise, as to the due process claim, that what they were doing, so they say, was pursuant to a legitimate government end, not maliciously motivated, and in any event, also qualified immunity would apply. The plaintiffs argue otherwise.

It is true with regard to a Fourth Amendment claim that a police officer has to act in a manner that is such that a reasonable officer would believe that what he was doing was reasonable and rot unreasonable.

The threshold issue with regard to the Fourth Amendment is whether in fact it even applies in this circumstance. The defendants say it does not because once there is an initial detention, arrest rather, the detention that follows for an arrestee is a due process analysis and not a Fourth Amendment analysis.

To this effect, the defendants cite Riley versus Dorton. That appears at 115 F.3d 1159, a 1997 case from the Fourth Circuit. To be sure, the Fourth Circuit held in that case that the Fourth Amendment does not embrace a theory of continuing seizure and does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody.

Now in Riley, apparently this individual was removed 90 miles from the place of his arrest and was in custody for two hours. It was held in that circumstance that the due process clause, the Fourteenth Amendment due process clause would apply and not the Fourteenth Amendment.

With regard to due process claims, as set out in Taylor versus McDuffie, 155 F.3d 479, at 483, a 1998 Fourth Circuit case, the plaintiff would have to show that defendants inflicted unnecessary and wanton pain and suffering, that a proper inquiry would be whether the force applied was in a good faith effort to maintain or restore discipline or whether it was done maliciously or sadistically for the very purpose of causing harm.

Beyond that, even if there is an issue of material fact as to whether defendants behaved maliciously or sadistically, plaintiff would have to show that his injuries resulting from the force were more than de minimis. That would be essentially the due process and again, a qualified immunity argument with regard to the due process claim.

The plaintiffs argue that the act of cuffing the plaintiff to the metal pole was objectively unreasonable, inappropriate, that presumably plaintiff could have been arrested in a fashion that would have had the officers perhaps supervise him,

supervising him cuffed in the car or watching him on the street while he was cuffed, but not linking him to a pole.

They also suggest that it was an act that Defendant Rozar himself understood to be wrong, that Rozar was acting, among other things, anonymously when he made the phone call and left the plaintiff linked to the pole.

Before I get to a specific comment on the Fourth Amendment analysis, it also bears talking about what the defendants had in mind because that goes to the due process analysis too. They felt, as they argued the case now, that they would have had to take Robles to Upper Marlboro, which was some 15 or 20 miles away from the point where they were prepared to deliver him, that he would, be in custody during that period of time that they would have to process him. So that in the end, time was saved by what they did.

Defendants really don't answer and can't properly defend the fact that they made an anonymous phone call in this regard and delivered the plaintiff up the way they did, with a note pinned to his chest, or however they chose to do that, but they say that basically they acted in an effort to maintain or restore discipline and given the fact that the plaintiff was in fact wanted on a warrant for hit and run, where he had tried to evade apparently responsibility, that what they did was reasonable.

The interesting issue here is whether subjective bad faith in this case will cure what otherwise might be an objectively reasonable act or acts on the part of defendants; that is, even if they acted this way, if what they did was

defensible from an objective standpoint, can they be held liable?

Again, with regard to the de minimis injuries under the due process claim, the defendants claim that these injuries were in fact de minimis, the 5, 10 or 15 minutes.

Let me address a number of these issues first. It is certainly a close question as to whether the Fourth Amendment applies in this case or the Fourteenth Amendment because this is not quite the facts of Riley versus Dorton. What happened here all happened within a matter of minutes after the plaintiff was arrested and in the same vicinity. So arguably what went on here was part of the arrest.

Assuming for a moment that it was part of the arrest and that the Fourth Amendment applies, the question is whether what the defendants did in this case was objectively unreasonable, and that is a difficult question. Up to point of the defendants placing the plaintiff on the fence and making an anonymous phone call to deliver him up, and pinning the note on his chest, everything that the defendants did in this case could be argued to be objectively reasonable; that is, they could detain him because he did present a potential flight risk and they could detain him in some fashion until the police might come because taking him back to Upper Marlboro and processing him was no better a time alternative than making him available there.

What is problematic in this case is the fact that the defendants obviously acted considerably out of line of ordinary performance by using the cuffs to cuff the plaintiff

to the metal pole and then making the anonymous call to the police.

The colloquy that is in the plaintiff's supplement to his opposition to the motion for summary judgment is really quite remarkable. When Rozar first requests that a Montgomery County supervisor meet him near the county line to discuss the transfer, Rozar says something to the Prince George's County dispatcher, Ms. Hicks, that is quite revealing.

I'll tell you -- this is Rozar speaking-- I'll tell you now on the phone what I wouldn't tell you on the air. What I was going to do if that was their plan, he says what I was going to do, I've got a set of flexcuffs in the car.

I'm just reading the pertinent language.

I've got a set of flexcuffs in the car and I was going to take him over to Montgomery County, handcuff him to a pole, pin his ID on the back of his shirt. I'm serious, he says in response to laughter.

Then she says come on now. He says absolutely. Then call 911 and say there is a man handcuffed to a telephone pole at such and such a location and let them handle it from there.

What are they going to do? They are going to show up. There's a guy flexcuffed to the pole with his ID on the back of the shirt. They are going to run him. She says I love it, I love it.

Then he says then they've got a problem getting off the flexcuffs, don't they? She says that's funny.

He says I mean what are they going to do? He's in Montgomery County. They have a warrant for him. What option would they have? I mean they could pitch a bitch about it. You know, it took us five minutes to do that. It would have taken us an hour and a half to drive him to Upper Marlboro, stand there while they processed him. Then we would have had a problem getting Marlboro to take him because, you know, we allknow that mess and it is their warrant.

You know, he isn't wanted for diddly squat here in PG County. We are doing them a favor. That's what I was doing. She says well, that sounds like fun. He said I even had the flexcuffs out. Did you really? Yeah. And so on.

Well, as it turned out, the connection between Montgomery and Prince George's police did not eventuate. The county indicated that they were not going to be picking up Mr. Robles. So hearing that, Rozar had Ms. Hicks contact Montgomery County and request that someone meet him at the line. Rozar then went out and determined to cuff Robles to the pole.

He then made a call to the nonemergency number of the Montgomery County Police Department. The call was recorded, and this what Rozar said.

He said there's a dude -- this is in the call to the Montgomery County dispatcher -- there's a dude tied up next to a building on 1620 Elkton Road, off of New Hampshire Avenue. He's just tied up next to a pole there. He says I was

just driving by and he's all tied up there. He can't move.

Could you tell whether he was black or white? He looked Spanish. We'll get someone out. Okay. All right. Bye.

Then, according to plaintiff, DeBarros asked Rozar how He should reportthe code that was made, how it should be coded out in police parlance, and was told to code it out as a 300 SOW, which means apparently that no action is taken, no report needs to be made. SOW stands for sent on the way.

That was the call. DeBarros calls Hicks and says go ahead and make it a 300 SOW, and Hicks laughs.

Later there is conversation between Rozar and Hicks where Hicks says did we get this guy on his way? Rozar said not exactly. Rozar said Montgomery County just got a call to respond to 1620 Elkton Road for a man tied up to a post. They just showed up. I'm gone.

So although there is some suggestion now by Rozar that he was nearby at Bob's Big Boy or whatever, clearly he was out of sight and did not want to be identified.

Well, all one has to do is read that transcript and be deeply troubled by what the Prince George's County Police Department did in this case. Constitutional violation or no, it is just very distressing conduct on the part of a police officer.

Having said that, it is still somewhat problematic under federal law as to whether there is a constitutional violation, but the Court is inclined to believe that even in the

absence of a specific provision to that effect, that there was a violation of the plaintiff's Fourth Amendment rights in this case or his due process rights, whichever applies. At least arguably there was and at this point I don't have to make the finding as a matter of law, but arguably a jury could find that there was a constitutional violation under either of these two provisions.

For federal liability purposes, however, there is the qualified immunity standard and that is a difficult standard to overcome because the plaintiff would have to establish that at the time of the incident, it was clearly established that such a specific act as this wouldviolate the Constitution.

Now that is not to say that it couldn't be established that what was done here was highly unreasonable, but this Circuit takes a very difficult view of whether and when acts are constitutionally, are clearly established for constitutional purposes as far as qualified immunity is concerned.

I have been, of course, involved in some of these cases as the trial judge, with regard to the media invasion case, Wilson versus Lane. Again, even then, where the Second Circuit had said on virtually identical facts, virtually identical in time that this was a clearly established provision, the Fourth Circuit said it was not, and so did the Supreme Court.

So despite the unpleasantness of the police behavior here, the Court is inclined to believe that the specific right here alleged, attaching the plaintiff to this metal pole, was not so clearly established that it states a constitutional claim under federal law.

I don't find that the case of DeGraff versus District of Columbia, at 120 F.3d 298, a D.C. Court of Appeals case from 1997, is inconsistent with that; although, that involved a woman chained to a mailbox. That was a DWI case. There is some factual issue about why the officers did what they did, what the motivation was. The D.C. Circuit simply remanded to the district court to determine whether there was in fact a need for the officers to do what they did without so finding.

On that basis the Court finds that there is qualified immunity. Having said that, however, it seems to me that the state constitutional claims do survive because there is no qualified immunity claim to be made with regard to the state constitutional claims.

The Court notes parenthetically that there is also no interlocutory appeal available with regard to the way the court has analyzed this case. So that one way or another, it is going to get tried on the state constitutional issues, which we should note are in pari materia with the federal causes of action.

Now having said that, where one is left, the Court does not find that the tort of intentional infliction of emotional distress has been made. However unpleasant and unreasonable this behavior was, it is not the kind of extreme and outrageous conduct that the court requires with regard to intentional infliction of emotional distress, that theMaryland courts require, that that cause of action be made. That is a rare tort sparingly applied. This is not that case. The Court will grant the motion for summary judgment as to Count 1.

The other issue that is somewhat problematic in this case and something I will have to revisit at the trial if the case does not otherwise settle out is whether the injuries were in fact de minimis in this case that might preclude application of a due process claim. Particularly to the extent that even allowing, as I say, under the due process analysis that acts are malicious and not done with any legitimate purpose, if the injuries are de minimis, then there is no claim.

There is a lot of knocking around and bumping about. Here you've got bruised feelings and they may have affected this particular plaintiff very deeply, but there is a serious question that remains with regard to the due process claim, even under state law.

Having said that, though, the case in all likelihood will survive the Fourth Amendment challenge, and so we might as well keep the due process claim in for present purposes and look at it again at trial.

The conspiracy claims, it seems to me, are well-taken to the extent that one can establish, it can be established that Rozar and DeBarros acted in concert to do what they did; that is, to violate the Fourth Amendment rights and/or the due process rights of the plaintiff, that there would be arguably a conspiracy action as stated here. At least for now the Court will deny the motion for summary judgment.

Summing up then, Count 1, motion for summary judgment for defendants granted, Counts 2 through 9 denied.

Let me just ask a question, which we didn't argue. Is there respondeat superior with regard to a state constitutional claim?

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CIVIL NO. PJM-99-31

[October 25, 1999]

NELSON O. ROBLES	)
	)
PLAINTIFF	)
	)
v.	)
	)
LIEUTENANT JAMES ROZAR, ET AL.,	)
	)
DEFENDANTS	)
	)

ORDER

Upon consideration of Defendants' Motion for Summary Judgment and Plaintiff's Opposition thereto, it is for the reasons stated on the record this 25 day of October, 1999

ORDERED :

1) Defendants' Motion is GRANTED IN PART

and DENIED IN PART;

2) The Motion is GRANTED as to Counts I through IV;

3) The Motion is DENIED as to Counts V through IX;

4) The pre-trial conference set for November 2, 1999 at 4:30 p.m. will remain as scheduled.

/s/_____
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE